



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Milwaukee Enrollment Services, Petitioner

vs.

DECISION

Case #: FOF - 158723

██████████ Respondent

Pursuant to petition filed June 27, 2014, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Milwaukee Enrollment Services to disqualify ██████████ from receiving FoodShare benefits (FS) for one year, a hearing was held on Thursday, August 7, 2014 at 09:00 AM, at Milwaukee, Wisconsin.

The issue for determination is whether the Respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Milwaukee Enrollment Services
1220 W. Vliet St.
Milwaukee, WI 53205

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES # ██████████) is a resident of Milwaukee County who received FS benefits in Milwaukee County from July 1, 2012 through June 30, 2014.
2. On May 12, 2014, someone called DHS's fraud tip line to report the Respondent was married and living with her husband since 2005. (Exhibit R52)

3. On June 2, 2014, Milwaukee Enrollment Services sent the Respondent six FoodShare Overpayment Notices:

Claim [REDACTED] for \$8,039.00 for the period of July 1, 2008 to June 30, 2008

Claim [REDACTED] for \$8,507.00 for the period of July 1, 2009 to June 30, 2010

Claim [REDACTED] for \$9,518.00 for the period of July 1, 2010 to June 30, 2011

Claim [REDACTED] for \$9,303.00 for the period of July 1, 2011 to June 30, 2012

Claim [REDACTED] for \$8,384.00 for the period of July 1, 2012 to June 30, 2013

Claim [REDACTED] for \$9,002.00 for the period of July 1, 2013 to June 30, 2014

(Exhibits R1, R3, R5, R7, R10 and R13)

4. On July 10, 2014, the Petitioner/county agency prepared an Administrative Disqualification Hearing Notice alleging that the Respondent intentionally violated the rules of the FoodShare program by concealing information that would have resulted in the reduction of her FoodShare benefits. (Exhibit R46)
5. During the times in question, Respondent lived at the address indicated above, under Parties of Interest. (Testimony of Respondent)
6. The Respondent is the sole owner of that property and has been so since November 2003. (Testimony of Respondent; Exhibit R59)
7. Respondent and her husband, [REDACTED], were married on June 25, 2005. (Testimony of Respondent; Exhibit R62)
8. Two years into the marriage, Respondent and her husband had marital difficulties stemming from his infidelity. (Testimony of Respondent; Exhibits P2, P5 and P6)
9. [REDACTED] moved out of Respondent's residence, but continued to use her address as a mailing address. (Id.)
10. [REDACTED] signed a rental lease agreement for an apartment on February 1, 2011, with [REDACTED] as his roommate. (Exhibit P7)
11. [REDACTED] then moved in with [REDACTED] sister, when [REDACTED] secured low income housing sometime around March 2013. (Exhibit P6)
12. [REDACTED] returned to Respondent's home around March 2014. (Testimony of Respondent; Exhibit R52)

DISCUSSION

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases. It is used in civil cases where a higher standard is required because the outcome could result in

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the opposite is true.

In the case at hand, the agency asserts that the Respondent failed to be honest about her household composition and income, by failing to report that her husband was living with her between July 2008 and June 2014.

The Period of July 2008 to February 2011

As discussed above, it is undisputed that Respondent and [REDACTED] have been married since 2005 and it is undisputed that [REDACTED] reported the Respondent’s address as his address during the time in question. The agency points out that it has submitted a My Vote Wisconsin print out showing that when [REDACTED] registered to vote in 2004, he did so listing the Respondent’s address as his residence and that he subsequently voted from that address in November 2008 and November 2010. (Exhibit R104)

As stated above, the burden of proof is the clear and convincing evidence standard, which is higher than the preponderance of the credible evidence standard used in other FoodShare hearings. Thus, in the absence of other documentation showing that [REDACTED] was living with the Respondent, this evidence is not enough for the agency to meet its burden to prove, by clear and convincing evidence that Respondent and [REDACTED] were living together. Indeed, there is no evidence that [REDACTED] made payments towards the mortgage, property taxes, utilities or repairs on the home between July 2008 to February 2011. There is no documentation showing that Respondent and [REDACTED] filed joint income taxes or claimed each other as dependents on their W-4s. There is no indication in the record that [REDACTED] kept any significant property at Respondent’s home between July 2008 and February 2011. Further, there is no indication that there were any children born to [REDACTED] and the Respondent before or since their marriage in 2005. In addition, it is undisputed that the Respondent is the sole owner of the home and has been so since before the marriage.

Based upon the foregoing, it is found that the agency has not met its burden to show that [REDACTED] and the Respondent were living together between July 2008 and February 2011.

The Period of February 2011 through January 2014

The next seven exhibits bore dates from between July 2011 and January 2014:

1. A police report dated July 15, 2011, listing [REDACTED]’s address as Respondent’s address. (Exhibit R99)
2. A recall petition signed by [REDACTED] on November 24, 2011, listing his address as being the same as Respondent’s address. (Exhibit R98)
3. A CCAP print out showing that someone reported [REDACTED]’s address as being the same as Respondent’s address, as of May 20, 2013. (Exhibit R97)
4. A report from the Wisconsin Department of Transportation (DOT) indicating that [REDACTED] applied for a vehicle title for a 2011 Honda on November 18, 2013 and listed his address as the Respondent’s address. (Exhibit R103)
5. A KIDS print out showing that [REDACTED] updated his address on 12/4/13 to Respondent’s address. (Exhibit R100)

6. A New Hire Information Print out showing that MPS listed [REDACTED]'s address as Respondent's as of December 4, 2013. (Exhibit R101)
7. A CCAP printout showing that someone reported [REDACTED]'s address as Respondent's address on January 27, 2014. (Exhibit R102)

The foregoing documentation again shows what Respondent does not dispute, that [REDACTED] used her address. He clearly did so, a lot. Given that Respondent and [REDACTED] were married, the agency's decision to question their living arrangement is understandable. Indeed, the police report (Exhibit R99) is particularly troubling, because it indicates the Respondent and [REDACTED] were in the same bedroom at about midnight when someone fired a gun at her residence on July 15, 2011. However, the Respondent has offered sufficient evidence to rebut the agency's claim that [REDACTED] was living with her between February 2011 and March 2014.

First, Respondent testified that she asked [REDACTED] to spend the night because her son, TE had been having trouble with another man and she was concerned for his safety and her own. This is also supported by that same police report, Exhibit R99.

Second, Respondent offered testimony that [REDACTED] and she were estranged during this time and no longer living together. Respondent's testimony is corroborated by the fact that the home is deeded solely in her name (Exhibit R59), by a lease signed by [REDACTED] in February 2011 for another residence (Exhibit P7) and a notarized statement from [REDACTED]'s subsequent landlord. (Exhibit P6)

Third, as noted above, there is no evidence that [REDACTED] made payments towards the mortgage, property taxes, utilities or repairs on the home during the time in question. There is no documentation showing that Respondent and [REDACTED] filed joint income taxes or claimed each other as dependents on their W-4s. There is no indication in the record that [REDACTED] kept any significant property at Respondent's home between July 2008 and February 2011. Further, there is no indication that there were any children born to [REDACTED] and the Respondent before or since their marriage in 2005.

Based upon all of the foregoing, there is insufficient evidence to prove [REDACTED] was living with Respondent between February 2011 to March 2014.

March 2014 through July 2014

Respondent testified that [REDACTED] moved back into her residence sometime around March 2014, which was two months after Respondent completed her renewal on January 23, 2014. (Exhibit R89) There is no indication in the record and no assertion that all members of Respondent's household were either elderly, blind or disabled. As such, Respondent was subject to reduced reporting requirements:

6.1.1.2 Change Reporting for All Other Food Units (Reduced Reporting)

All other food units [i.e., household's which do not have an EBD member] are only required to report if their total monthly gross income exceeds 130% ([8.1.1](#)) of the Federal Poverty Level (FPL) for their reported food unit size. This change must be reported by the 10th of the month following the month in which the total income exceeded 130% of the FPL.

As long as a food unit's total income is less than 130% of the FPL, a food unit need not report changes in income, assets, address changes, household composition, etc. This is known as "Reduced Reporting" requirements.

...

FSH, §6.1.1.2.

This follows Federal law which directs that States may:

“...require households with income that are assigned 6-month or longer certification periods to *report only changes in the amount of gross monthly income exceeding 130% of the monthly poverty income guideline.*”
7 C.F.R. § 273.12(a)(vii); (emphasis added.)

130% FPL for Respondent's reported household size of 6 was/is \$3,423. *FSH §8.1.1.* Thus, per *FSH §6.1.1.2*, Respondent would only have had to reported [REDACTED] in her home if his added income put her over the \$3,423 130% FPL income limit.

Exhibit R117 is a Work Number print out showing [REDACTED]'s earnings from his job with the City of Milwaukee. According to that exhibit, [REDACTED] received a paycheck on March 13, 2014, with gross earnings of \$2,045.71 and he received a paycheck on March 27, 2014 with gross earnings of \$1,706.78. In addition the State Wage Record, indicates that [REDACTED] earned \$2962.96 from Milwaukee Public Schools, during the first quarter of 2014, which would work out to be an average of \$987.65 per month. (Exhibit R113)

[REDACTED]'s total earned income for March 2014 was $\$2,045.71 + \$1,706.78 + \$987.65 = \4740.14

According to the State Wage Record, Respondent's first quarter earnings for 2014 totaled \$998.00, which would work out to be an average of \$332.66 per month. (Exhibit R118)

Totaling [REDACTED]'s earned income with Respondent's earned income we have $\$4740.14 + 332.66 = \$5,072.80$.

This, alone, is over the 130% FPL income limit of \$3,423.13. As such, Respondent needed to report [REDACTED]'s income by April 10, 2014, which would have affected her benefits beginning May 2014. *See FSH, §7.3.2.1. (It should be noted that Respondent's household also had unearned income that was not included in the above calculation, but would have put Respondent farther above the 130%FPL income limit.)*

It is undisputed that the Respondent did not report [REDACTED] becoming part of her household, nor did she report his income to the agency by April 10, 2014. Thus, the agency has met its burden to prove, by clear and convincing evidence, that the Respondent violated the rules of the FoodShare program by withholding information about her income and household composition.

There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. *See John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977).

There is no evidence in the record to rebut the presumption that the Respondent intentionally concealed information concerning her husband's move into her residence. On the contrary, the record supports the conclusion that the Petitioner was aware of the rules, but violated them anyway.

Respondent failed to report her husband and his income to the county agency, even though the ACCESS renewal she completed on January 23, 2014, clearly advised her that she needed to report changes in income that put her over the 130% FPL income limit and listed the dollar amount of that income limit. (Exhibit R89, pgs. 8 and 9) That same ACCESS renewal form also contained a FoodShare Penalty Warning that advised the Respondent that if she hid information to continue getting FoodShare benefits, that she could be barred from the program or prosecuted criminally, but she still withheld information about her husband's income and presence in her home after March 2014.

There could be no other purpose for this failure, other than a desire to maintain her FoodShare benefits, to which she was no longer entitled as of May 2014.

There is no evidence in the record of any prior Intentional Program Violations for Respondent.

Based upon the record before me, I find that the county agency has established by clear and convincing evidence that the Respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the Respondent. Therefore, the Petitioner correctly seeks to disqualify the Respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The Respondent violated, and intended to violate, the FS program rule specifying that she needed to report any increase of income that put the household income over 130% of FPL, per 7 C.F.R. § 273.12(a)(vii).
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the Respondent.

NOW, THEREFORE, it is

ORDERED

That the Petitioner's IPV determination is sustained, and that the Petitioner may make a finding that the Respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

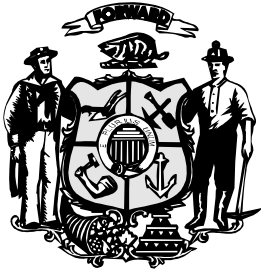
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 18th day of September, 2014.

\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Miles - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAMail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on September 18, 2014.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability